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Supreme Court, U.S.
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Supreme Court of the United States
October Term, 1997

MARC TIMMERMAN
Petitioner

VERSUS

EDWARD MCLAUGHLIN, JOAN THOMPSON,
FOREST BENEDICT, EPHRAIM GUTMARK,
ERNIE SANCHEZ, ANDRE GUERIN,
CARL ROSTOW, WILLIAM DAVIS, WILLIAM JENKINS
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Louisiana State University ("L.S.U.") hired Timmerman effective August 21, 1995, as an Assistant Professor of Mechanical Engineering.

Shortly after his arrival on the L.S.U. campus, on September 21, 1995, Timmerman met with defendant Forest Benedict, Director of the L.S.U.'s Department of Human Resource Management, and expressed his unhappiness with his situation at L.S.U. Timmerman expressed concern that L.S.U. might never grant him tenure. Timmerman also said he was concerned his reliance on public transportation due to stress-related problems was denying him consulting opportunities and causing him logistical problems. Finally, Timmerman told Benedict he wanted to leave L.S.U. but would stay the one year necessary to apply for benefits with the University's disability insurance

carrier. Two days later, Timmerman expressed the same concerns to defendant Edward McLaughlin, Dean of L.S.U.'s College of Engineering.

On September 27, 1995, a man who identified himself as Carl Fork (hereinafter "Fork"), telephoned the office of defendant Ephraim Gutmark, head of L.S.U.'s Department of Mechanical Engineering. Gutmark was unavailable but returned the call the next day. The man, who again identified himself as Carl Fork, told Gutmark that he was a close personal friend of Timmerman. Fork next told Gutmark that Timmerman was very unhappy at L.S.U. and was considering killing himself and/or colleagues. Fork said he knew Timmerman was capable of such action because he (Fork) had once trained Timmerman in the use of handguns. Fork also told Gutmark that Timmerman had recently prepared a will, pre-paid his funeral

expenses, and purchased two new handguns.

After the conversation was over, Gutmark telephoned McLaughlin and related the substance of his conversation with Fork. That same day, defendants McLaughlin, Benedict, and Joan Thompson, Assistant Director of Human Resource Management, placed a telephone conference call to Fork. Also present in McLaughlin's office was an officer with the L.S.U. campus police. Fork was advised the conversation was being monitored via speaker phone. Fork then reiterated that he was a friend of Timmerman's, that he had once trained Timmerman in the use of handguns, that Timmerman had recently purchased several handguns, and that, in recent conversations, Timmerman had discussed possibly killing himself and/or his colleagues and superiors at L.S.U. Fork told the listeners Timmerman had a history of mental problems but refused

the recommendations of psychologists because he felt they were not his mental equals. Fork also told the listeners Timmerman had applied for life insurance on September 13, 1995, and named the Hemlock Society, described as a pro-suicide organization, as the beneficiary. A search of University records revealed that on the exact date identified by Fork, Timmerman had named the Hemlock Society as beneficiary of his TIAA-CREF retirement benefits.

On October 2, 1995, Benedict met with Timmerman and told him he was being placed on paid administrative leave pending a psychological evaluation. Timmerman responded that he had seen other mental health professionals in the past and that he believed he was capable of compromising the test due to his high I.Q. Timmerman requested and was granted additional time prior to the evaluation to obtain counsel.

On October 4, 1995, Benedict instructed Ruth Stevens, Administrative Analyst with the Department of Human Resource Management, to search Timmerman's office for a gun. Stevens proceeded to Timmerman's office accompanied by Gutmark and by defendants Ernie Sanchez and Andre Guerin of the L.S.U. campus police. Gutmark unlocked the door, then waited outside while Stevens, Sanchez, and Guerin searched the office. They confined their search to areas large enough to hold a gun. No gun was located and nothing was removed from the office.

Timmerman filed this suit in the United States District Court for the Middle District of Louisiana on January 12, 1996. He asserts claims under 42 U.S.C. § 1983 for violations of his rights under the Fourth and Fourteenth Amendments, and under the Americans With Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*

On February 3, 1997, the trial court granted summary judgment in favor of the individual defendants. Pertinent to the present petition, the trial court ruled that the search of Timmerman's office was reasonable, and that his Fourth Amendment claim therefore failed. The United States Court of Appeals for the Fifth Circuit affirmed.

SUMMARY OF ARGUMENT

The lower courts applied the proper standard in finding that defendants' search of Timmerman's office was reasonable. The lower courts ruled that the "reasonable under all the circumstances" standard, rather than the "probable cause" standard, governs the search of the plaintiff's office. The reasonableness standard is the appropriate standard because the search was for work-related misconduct. The presence of campus police officers does not require

that a different standard be applied. Applying the reasonableness test, the lower courts correctly found that defendants reasonably relied on the detailed and corroborated statements of Carl Fork.

ARGUMENT

The lower courts properly analyzed the search of Timmerman's office under the "reasonableness under all the circumstances" test of O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987), rather than the probable cause test.

A. The Search Was An Investigation Of Work-Related Misconduct

Contrary to Timmerman's assertions, L.S.U. officials authorized and conducted the office search to investigate possible work-related misconduct. Harming or killing one's co-workers constitutes the most serious kind of work-related misconduct. Louisiana law requires employers to provide employees with a safe work environment.

See, e.g., Mundy v. Department of Health & Human Resources, 620 So. 2d 811 (La. 1993); Williams v. Homco International, Inc., 402 So. 2d 182 (La. App. 1st Cir. 1981). Although the duty does not always extend to protecting employees from the willful conduct of co-employees, *see, e.g.*, Barto v. Franchise Enterprises, Inc., 588 So. 2d 1353 (La. App. 2d Cir. 1991), *writ denied*, 591 So. 2d 708 (1992), the employer may be liable for the willful conduct of co-employees if the employer has been warned or put on notice of the potential for harm, as was L.S.U. *See, e.g.*, Griffin v. Wolf's, Inc., 61 So. 2d 523 (La. App. 2d Cir. 1952). Because society charges an employer with the extraordinary duty of protecting employees from co-employees and third persons, the employer's reasonable efforts to satisfy that obligation must be considered work-related. This is especially so in the

context of a large state university, which has thousands of employees and is attended by tens of thousands of students.

At the time L.S.U. officials decided to search his office, Timmerman was not suspected of any criminal activity, and the search was motivated solely by a desire to satisfy L.S.U.'s obligation to provide a safe work environment. However, even if, as Timmerman contends, the search was conducted for reasons not wholly unrelated to criminal conduct, respondents respectfully suggest the *O'Connor* test still applies. At least one United States Court of Appeals has applied *O'Connor* to the search of an office for reasons almost *entirely related* to illegal conduct. In United States v. Johnson, 16 F.3d 69 (5th Cir. 1994), the defendant, a loan officer in a municipal economic development agency, was arrested for making illegal loans while employed at

an earlier job. Upon learning of his arrest, his current employer searched his office for documents related to possible illegal loans made while employed at his present job. Applying *O'Connor*, the Fifth Circuit upheld the search.

B. The Presence Of Campus Police Does Not Render O'Connor Inapplicable

The *O'Connor* reasonableness standard applies regardless of whether campus police were involved in the search. Notwithstanding Timmerman's argument to the contrary, it is the purpose of the search rather than the presence of campus police that makes *O'Connor* applicable. The defendant campus police officers did not participate in the search of Timmerman's office for purposes of gathering evidence; indeed, Timmerman was never suspected of any criminal wrongdoing. Rather, the search was initiated by officials in the Department of Human Resources solely for the purpose of

safeguarding lives and providing a safe work environment to both employees and students.

Department of Human Resources officials asked the campus policemen to participate in the search because they were searching for firearms: *dangerous weapons*. They did not know whether they might find firearms; they did not know what type of firearms they might find; they did not know whether the firearms might be loaded; they did not know whether the firearms might have been modified or tampered with. Motivated by their obligation to ensure a safe work environment, Department of Human Resources officials were in the uncomfortable position of searching for something that could cause serious harm to themselves or others. It was therefore entirely reasonable to bring along campus police officers, who are trained in the safe handling of guns.

C. The Search Was Reasonable Under All The Circumstances

In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the Supreme Court of the United States developed a totality of the circumstances test by which to analyze an informant's tip: in considering a tip, a court should consider, among other items, the informant's veracity, reliability, and basis of knowledge, and a deficiency in one may be compensated for by a strong showing of some other indicia of reliability. *Gates*, 462 U.S. at 233, 103 S. Ct. 2339.

The trial court listed five specific reasons why defendants reasonably relied on Fork's statements: (1) Fork was not an anonymous caller, but identified himself to University officials and provided them with his phone number, (2) Fork knew not only that Timmerman had named the Hemlock Society as his insurance beneficiary, but also knew

the exact date on which Timmerman made this designation, (3) Fork told Benedict that Timmerman had refused to accept the recommendations of mental health professionals in the past, a fact Timmerman had himself previously communicated to Benedict, (4) Fork told Gutmark that Timmerman was unhappy with his department and with Gutmark, facts Timmerman had himself previously communicated to other L.S.U. officials, and (5) Fork told Gutmark Timmerman was suffering from stress, a fact Timmerman had himself previously communicated to other L.S.U. officials. Thus, the search was reasonable at its inception. The search also was reasonable in scope. Defendants allege, Timmerman does not dispute, and the trial court specifically found that the search was limited to areas inside Timmerman's office that were large enough to contain a gun.

CONCLUSION

The appropriate standard by which to analyze the search of Timmerman's office is the reasonableness under all the circumstances test. The search was for work-related misconduct, and the presence of campus police officers does not require that a different standard be applied. Applying that test, the trial court correctly found defendants acted reasonably in searching Timmerman's office based on the detailed and corroborated statements of Carl Fork, an identified citizen. Defendants respectfully request that this Honorable Court deny Timmerman's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

By Attorneys,

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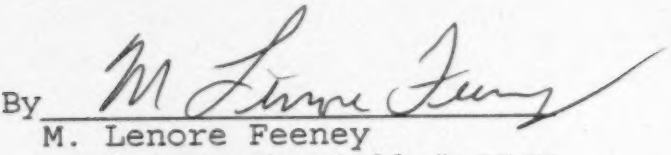
& PHILLIPS, L.L.P.

By 

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